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## 10.1 Available Pleas

A respondent may make a plea of admission or no contest to the original charge in the petition at any time after the petition is filed. MCR 5.971(A). A petition is not deemed filed until, following authorization by the court at a preliminary inquiry or preliminary hearing, it is delivered to and accepted by the clerk. See MCR 5.903(A)(5).

The court has discretion to allow a respondent to enter a plea of admission or no contest to an amended petition, provided that the petitioner and child's attorney\* have received notice of the plea offer and been given an opportunity to object. MCR 5.971(A).

\*See Sections 7.10–7.13 for a detailed discussion of appointment of counsel for children.

**Note:** Pleas to amended petitions are common in child protective proceedings, and many pleas to amended petitions result from plea agreements. Although child protective proceedings are not criminal proceedings, the rules governing plea agreements in criminal cases may be instructive. See Miller, *Juvenile Justice Benchbook: Delinquency and Criminal Proceedings* (MJJ, 1998), Sections 17.6–17.7, for a discussion of plea agreements in criminal cases involving juveniles, and Section 10.12, below, for a discussion of the rules governing the withdrawal of pleas in child protective proceedings.

Note, also, that an amendment to the petition may affect subsequent treatment of the respondent-parent. The treatment regime specified in the Case Service Plan is based upon the needs of the family rather than upon the allegations in the petition. However, if the allegations in the amended petition bear little or no resemblance to those that were contained in the original petition, it may be wise to include specific treatment programs and goals in any plea agreement. If a respondent-parent objects to the prescribed treatment, the court may examine the issue at a review hearing. See Chapter 16. The court has the authority to order the parent to attend classes or counseling if it is “necessary for the physical, mental, or moral well-being” of the child under its jurisdiction. See *In re Macomber*, 436 Mich 386, 389–93, 398–400 (1990). Furthermore, if the prosecuting attorney has agreed not to proceed on some of the allegations in the original petition (“nolle prosequi”) rather than dismissing them, those allegations could later be reinstated and a trial of them held.

## 10.2 Right to Have a Judge Preside at Plea Proceeding

Parties have a right to have a judge preside at hearings on the formal calendar. MCR 5.912(A). “Formal calendar” encompasses hearings subsequent to a preliminary inquiry or preliminary hearing. MCR 5.903(A)(6). Thus, the parties have the right to have a judge preside at a plea proceeding.

## 10.3 Referees Who May Conduct Plea Proceedings

If a party has not demanded that a judge preside at the plea proceeding, the court may assign a referee to conduct the proceeding. MCR 5.913(A)(1). A referee who conducts a plea proceeding must be licensed to practice law in Michigan. MCR 5.913(A)(3).

Referees may administer oaths and examine witnesses, and, if a case requires a hearing and taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court’s findings and disposition. MCL 712A.10(1)(b)–(c); MSA 27.3178(598.10)(1)(b)–(c). Referees do not have authority to enter orders.\*

\*See Form JC 13, which allows a referee to recommend that a plea be or not be accepted.

## 10.4 Persons Entitled to Notice of Plea Proceedings

The court must ensure that the following persons are notified of the hearing at which the plea may be accepted:

- F the respondent. For purposes of abuse or neglect proceedings in which termination of parental rights is not requested, “respondent” means the parent who is alleged to have committed an offense against the child. MCR 5.903(C)(8);
- F a parent or guardian, if any, other than respondent;
- F the attorney for the respondent;
- F the child or the attorney for the child;
- F the petitioner;
- F the guardian ad litem or a party appointed pursuant to the court rules; and
- F any other person the court may direct to be notified.

MCR 5.921(B)(1)(a)–(g). Notice of the hearing must be given in writing or on the record at least seven days prior to the hearing. MCR 5.920(C)(1).

**Note:** The court is required to appoint a “lawyer-guardian ad litem” for the child. In some circumstances, the court may also appoint an “attorney,” and/or a “guardian ad litem.” See MCL 712A.13a(1)(b), (e), and (f); MSA 27.3178(598.13a)(1)(b), (e), and (f). For purposes of a required notice, “attorney” includes “lawyer-guardians ad litem.” The appointment of counsel for a child is discussed in detail in Sections 7.10–7.13.

However, if a party appears without having been properly served, that party may waive notice of hearing or service of process.\* A waiver may also be obtained when service of process was untimely. MCR 5.920(E) states that the waiver must be in writing and the party must be advised as set forth in MCR 5.920(B)(3):

- F of the nature of the hearing;
- F of the right to counsel, retained or appointed;
- F of the right to trial by judge or jury; and
- F that the plea could result in termination of the respondent’s parental rights;

and must be served with a copy of the petition.

\*See Form JC 23, which contains the required notices of rights.

## 10.5 Appearance of Prosecuting Attorney

If the court requests, the prosecuting attorney must appear at any proceeding. MCR 5.914(A). Thus, the prosecuting attorney may be required to appear at a plea proceeding.

“Prosecuting attorney” means the prosecuting attorney of the county in which the court has its principal office or an assistant to the prosecuting attorney. MCR 5.903(C)(7).

## 10.6 Appearance of Lawyer-Guardian Ad Litem for Child

The court must appoint a lawyer-guardian ad litem to represent the child, and the child may not waive the assistance of a lawyer-guardian ad litem. MCL 712A.17c(7); MSA 27.3178(598.17c)(7). MCL 712A.17d(1)(g); MSA 27.3178(598.17d)(1)(g), provides that the lawyer-guardian ad litem must attend all hearings, including plea proceedings, and substitute representation for the child only with court approval.\*

## 10.7 Appointment of Attorney for Respondent

At the respondent’s first court appearance, the court must advise the respondent of the right to retain an attorney to represent him or her at any hearing and that:

- (i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and
- (ii) if the respondent is not represented by an attorney, the respondent may request and receive a court-appointed attorney at any later hearing.

MCR 5.915(B)(1)(a)(i)–(ii) and MCL 712A.17c(4)(a)–(c); MSA 27.3178(598.17c)(4)(a)–(c). Thus, if the respondent did not appear at the preliminary hearing, the court must advise the respondent of these rights.

If the respondent wants an attorney, and when it appears to the court, following an examination of the record, through written financial statements, or through other means, that the respondent is financially unable to retain an attorney, the court must appoint an attorney to represent the respondent. MCR 5.915(B)(1)(b) and MCL 712A.17c(5); MSA 27.3178(598.17c)(5).\*

The respondent may waive the right to an attorney, but the court shall not accept a waiver if the respondent is a minor and a parent or guardian ad litem objects. MCR 5.915(B)(1)(c) and MCL 712A.17c(6); MSA 27.3178(598.17c)(6).\*

\*See Sections 7.10–7.11 for a detailed discussion of the powers and duties of lawyer-guardians ad litem.

\*See Form JC 03.

\*See Form JC 06.

## 10.8 Required Advice of Rights

Before accepting a plea, the court must advise the respondent on the record or in a writing that is made a part of the case file:

- (1) of the allegations in the petition;
- (2) of the right to an attorney, if the respondent is without counsel;
- (3) that if the court accepts the plea the respondent will give up the rights to:
  - (a) trial by a judge or trial by a jury,
  - (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
  - (c) have witnesses against the respondent appear and testify under oath at the trial,
  - (d) cross-examine witnesses,
  - (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor; and
- (4) of the consequences of the plea including that the plea can later be used to terminate parental rights.

MCR 5.971(B)(1)–(4).

## 10.9 Requirement of a Knowing, Understanding, Voluntary, and Accurate Plea

Before accepting a plea, the court must satisfy itself that the plea is knowingly, understandingly, and voluntarily made. MCR 5.971(C)(1).

- F** The court may establish that the respondent's plea is knowingly and understandingly made by advising him or her as required by MCR 5.971(B).<sup>\*</sup> See also MCR 5.941(C)(1)(a)–(c) (delinquency proceedings) and MCR 6.302(B)(1)–(5) (pleas in felony cases). The court need not ask respondent directly if his or her plea is knowingly made. *In re King*, 186 Mich App 458, 466–67 (1990) (trial court's lengthy discussion with respondent regarding a plea agreement clearly showed that plea was knowingly made).
- F** The court may establish that the plea is voluntarily made by confirming any plea agreement on the record and asking the respondent and all attorneys of record if any promises have been made beyond those in the agreement, or if anyone has threatened the respondent. See MCR 5.941(C)(2)(a)–(b) (delinquency proceedings) and MCR 6.302(C)(4)(a)–(c) and MCR 6.302(E) (pleas in felony cases).

<sup>\*</sup>See Section 10.8, immediately above.

- F In addition, the court must establish support for a finding that the child comes within the jurisdiction of the court. If the respondent is entering a plea of admission, the accuracy of the plea should be established by questioning the respondent. MCR 5.971(C)(2). See *In re Waite*, 188 Mich App 189, 193–96 (1991) (inadequate factual basis established at plea proceeding), and *In re Youmans*, 156 Mich App 679, 684 (1986) (jurisdiction cannot be conferred on the Family Division by consent of the parties).

## 10.10 Special Requirements for No Contest Pleas

If the respondent wishes to plead no contest, the court must not question the respondent to establish support for a finding that the respondent committed the offense against the child but must use some other means. The court must also state why a plea of no contest is appropriate. MCR 5.971(C)(2). See *Guilty Plea Cases*, 395 Mich 96, 134 (1975), for a discussion of appropriate reasons to accept a plea of no contest.

## 10.11 Records of Plea Proceedings

MCR 5.925(B) requires that a record of all proceedings on the formal calendar be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. “Formal calendar” means the judicial phases other than a preliminary inquiry or a preliminary hearing. MCR 5.903(A)(6). Thus, plea proceedings must be recorded.

## 10.12 Preservation of Issues for Appeal

A respondent-parent must raise issues concerning the court’s non-compliance with the court rule governing pleas prior to appeal. *In re Campbell*, 170 Mich App 243, 249–50 (1988). Although child protective proceedings are not criminal proceedings, rules governing the withdrawal of pleas in criminal proceedings may be relied upon in protective proceedings. *In re Zelzack*, 180 Mich App 117, 125–26 (1989).

Juveniles charged as delinquents and criminal defendants have the right to withdraw a plea before it is accepted, and the court has discretion to allow a juvenile or criminal defendant to withdraw a plea after it has been accepted. See MCR 5.941(D) (delinquency proceedings) and MCR 6.310 and MCR 6.311 (criminal proceedings).\*

\*See Miller, *Juvenile Justice Benchbook: Delinquency and Criminal Proceedings* (MJJ, 1998), Sections 17.15–17.16, for a detailed discussion of plea withdrawal.

## 10.13 Combined Adjudicative and Dispositional Hearings

Because MCR 5.973(A)(2) assigns to the court’s discretion the interval between a trial and dispositional hearing (though not to exceed 35 days), the two hearings may be combined if necessary preparations are completed

prior to the hearing. Most importantly, a Case Service Plan must be prepared prior to the hearing. See MCR 5.973(A)(4)(a).

Combined hearings are often conducted when the allegations in the petition are uncontested.

